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No. 94—1039

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ROY ROMER, AS GOVERNOR OF THE STATE OF COLORADO, AND THE STATE OF COLORADO,

Petitioners,

v.

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, THE BOULDER VALLEY SCHOOL DISTRICT RE-2, THE CITY AND COUNTY OF DENVER, THE CITY OF BOULDER, THE CITY OF ASPEN, AND THE CITY COUNCIL OF ASPEN,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of Colorado

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE AMERICAN CENTER FOR LAW & JUSTICE FAMILY LIFE PROJECT AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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24 pp

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MOTION OF THE AMERICAN CENTER FOR LAW AND JUSTICE FAMILY LIFE PROJECT AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.4, the American Center for Law and Justice Family Life Project (ACLJ) seeks leave to file a brief amicus curiae in support of petitioners. In support of its motion, the ACLJ states:

1. The ACLJ has received consent to file its brief from Timothy M. Tymkovich and Jean E. Dubofsky, counsel for petitioners and several of the respondents in this case. Copies of the letters of consent are being submitted along with this motion.

2. On April 18, 1995, counsel employed by the ACLJ spoke over the telephone with John P. Worcester, counsel for the remaining respondents City of Aspen and City Council of Aspen. Mr. Worcester informed ACLJ counsel that his clients would not consent to the filing of any amicus briefs, but that his clients would not oppose any amicus briefs being filed.

3. As noted more fully in the Interest of Amicus section in the brief, ACLJ attorneys have participated as counsel in a number of cases before this Court. Based on an examination of the Petition for Certiorari and the briefs supporting and opposing that petition, ACLJ counsel believe that the ACLJ's brief brings relevant matter to the Court that is not already before the Court and will be of help to the Court in deciding this case.

WHEREFORE, the ACLJ respectfully asks that this Court grant the ACLJ leave to file its brief amicus curiae in support of petitioners.

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QUESTION PRESENTED

Whether a state, having a rational basis to do so, may make it more difficult to enact legislation that would establish intrusive regulation of private behavior and property and would cause conflicts with the religious liberty of many of the state's citizens, to prevent discrimination against members of a non-suspect class that is defined by its members' conduct rather than by any immutable characteristic, that enjoys considerable political influence, and whose members are economically advantaged compared to other similarly-situated citizens.

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BRIEF OF THE AMERICAN CENTER FOR LAW & JUSTICE FAMILY LIFE PROJECT AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS

The American Center for Law and Justice (ACLJ) is a public interest law firm and educational organization dedicated to protecting religious liberty, human life, and the family. ACLJ has argued or participated as amicus curiae in numerous cases in this Court. See,

e.g., *Lamb's Chapel v. Center Moriches Union Free School District*, 113 S. Ct. 2141 (1993); *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993); *United States v. Kokinda*, 497 U.S. 720 (1990); *Board of Education v. Mergens*, 496 U.S. 226 (1990); *Frisby v. Schultz*, 487 U.S. 474 (1988); *Board of Airport Commissioners v. Jews for Jesus*, 482 U.S. 569 (1987). ACLJ attorneys also have litigated cases involving the conflicts between state anti-discrimination laws and religious liberties in courts across the country.

The ACLJ Family Life Project recognizes the family as the primary social and religious institution of any just society. The Family Life Project is committed to the two-parent, marriage-bound family as the primary mediating institution of civilization, and to efforts to defend the family against all attempts to undermine its sovereignty, primacy, and importance.

The ACLJ, in its dedication to defending the rights of religious believers, is committed to defending the family as long understood within the classical Judeo-Christian tradition as a "domestic church," or, "church in the home." These phrases, hearkening back centuries, imply that the believing family is itself a religious institution. The American Center for Law and Justice Family Life Project submits this brief in support of the petitioners because of the inevitable conflict between religious belief and laws banning discrimination based on sexual orientation. Amendment 2, Colo. Const. art. II § 30b, the Colorado constitutional provision at issue in this case, serves the legitimate purpose of (among others) protecting Colorado citizens' religious liberties from unnecessary and intrusive government regulation on behalf of a class whose members do not need special government protection and is a class defined by conduct that undermines the traditional marriage-bound, two-parent family. The ACLJ Family Life Project urges this Court to reverse the Colorado Supreme Court's decision striking down Amendment 2.

SUMMARY OF ARGUMENT

While it is true that Amendment 2 singles out homosexuals for special treatment, that treatment does not violate the Equal Protection Clause. None of the normal criteria for determining that a particular class of people is a suspect class applies to homosexuals. First, homosexuals are not a group in need of special protection from majoritarian processes. Homosexuals as a group are comparatively more affluent and better educated than similarly situated heterosexuals. Homosexuals also are not a politically powerless minority. Second, homosexuality, unlike race, national origin, and sex, is not an immutable characteristic that is irrelevant to personal character. Rather, homosexuals as a class are defined by their sexual proclivities and conduct. This Court has held in *Bowers v. Hardwick*, 478 U.S. 186 (1986), that homosexual conduct is not constitutionally protected. Moreover, that conduct is at least morally controversial; that a person is known to be homosexual, therefore, tells us much about the person's character because it tells us that person engages in or desires to engage in morally controversial conduct. A classification based on conduct that bears a rational relationship to an assessment of character is much different than classifications based on skin color or national origin, factors that are immutable and irrelevant to character.

Despite the fact that homosexuals do not constitute a suspect class, the Colorado Supreme Court applied strict scrutiny to strike down Amendment 2. The Court did so by inventing a new "fundamental right to equal participation in the political process." In creating this right, the court placed great reliance on a line of cases from this Court that considered state laws placing special burdens on the enactment of legislation desired by identifiable groups of voters. But those cases in that line that applied strict scrutiny did so not because a fundamental right was involved but because the identifiable groups singled out were suspect classes. When suspect classes were not involved, this Court did not apply strict scrutiny. Compare

Hunter v. Erickson, 393 U.S. 385 (1969) (striking down a state referendum requirement placing special burdens on laws benefitting racial minorities) with *James v. Valtierra*, 402 U.S. 137 (1971) (upholding a state law requiring voter approval of low-income public housing). Thus, this Court never has recognized the "fundamental right" that the Colorado Supreme Court has invented.

Where a law neither implicates a fundamental right nor draws suspect classifications, the law does not violate the Equal Protection Clause if it rationally relates to a legitimate government interest. Amendment 2 furthers at least three legitimate state interests: Amendment 2 protects property and associational rights by making it more difficult to enact laws restricting the people's right to associate and use their property; Amendment 2 allows the state to preserve its civil rights enforcement resources for use in protecting traditional suspect classes more in need of protection than homosexuals; and Amendment 2 protects religious liberty by making it harder to enact laws that would create conflicts between religious conviction and legal duty. Because Amendment 2 rationally relates to legitimate state interests, does not draw a suspect classification, and impinges on no fundamental right, this Court should reverse the Colorado Supreme Court's decision and hold that Amendment 2 does not violate the Equal Protection Clause.

I. THIS COURT HAS NOT RECOGNIZED AND SHOULD NOT RECOGNIZE THE FUNDAMENTAL RIGHT TO EQUAL PARTICIPATION IN THE POLITICAL PROCESS INVENTED BY THE COLORADO SUPREME COURT.

Under traditional equal protection analysis, "[A] classification neither involving fundamental rights nor proceeding along suspect lines" is presumed valid and violates the Equal Protection Clause only if the classification does not rationally relate to some legitimate government purpose. *Heller v. Doe*, 113 S. Ct. 2637, 2642 (1993). The respondents claim that Amendment 2 unfairly singles

out homosexuals[1] by creating special burdens to enacting legislation favorable to homosexuals. But the respondents did not challenge in the Colorado Supreme Court the trial court's finding that homosexuals are not a suspect class. *Evans v. Romer*, 882 P.2d 1335, 1341 n. 3 (Colo. 1994) (*Evans II*). The Colorado Supreme Court did not find expressly that homosexuals are a suspect class. Instead, the court applied strict scrutiny, rather than rational basis analysis, to strike down Amendment 2 because the court found that Amendment 2 implicated the "fundamental right to participate equally in the political process" by "'fencing out' an independently identifiable class of persons"–homosexuals. *Id.* at 1339; *Evans v. Romer*, 854 P. 2d 1270, 1282 (Colo. 1993) (*Evans I*).

The Colorado Supreme Court cobbled this right together from various strands of case law. But the Court found the right's "most explicit, and nuanced, articulation" in cases involving "legislation which prevented the normal political processes from enacting particular legislation desired by an identifiable group of voters," *Evans II*, 854 P. 2d at 1279. Cases in that line include *Hunter v. Erickson*, 393 U. S. 385 (1969), *James v. Valtierra*, 402 U. S. 137 (1971), *Gordon v. Lance*, 403 U. S. 1 (1971), and *Washington v. Seattle School District No. 1*, 458 U. S. 457 (1982).

As dissenting Justice Erickson in the Colorado Supreme Court and other amici to this Court have ably demonstrated, these cases do not support the Colorado Supreme Court's finding that a fundamental right to equal participation in the political process exists. See *Evans II*, 882 P. 2d at 1357-59 (Erickson, J., dissenting); *Evans I*, 854 P. 2d at 1296-1300 (Erickson, J., dissenting); Petition for Certiorari at 8-14; Brief of Amici Curiae States in Support of Petition for Certiorari at 4-9; Brief Amicus Curiae Colorado for Family Values in Support of Petition for Certiorari at 9-11. As

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[1] For convenience, we will refer collectively to male homosexuals, bisexuals, and lesbians as homosexuals.

Justice Erickson and the other amici have demonstrated, when this Court has applied strict scrutiny in cases such as *Hunter* and *Washington*, it has done so not because of any fundamental right to equal participation but because the special burdens placed on enacting certain legislation in those cases discriminated against suspect classes.

Thus, where states made it more difficult to enact legislation that would benefit racial minorities, the paradigm suspect class, this Court applied strict scrutiny and found violations of the Equal Protection Clause. See *Hunter*, 393 U.S. at 389-92 (striking down a referendum requirement that put special burdens on the enactment of fair housing legislation that would benefit racial minorities); *Washington*, 458 U. S. at 467-87 (striking down a state constitutional amendment requiring state-wide approval of local decisions to bus school children to desegregate schools). But where race was not involved, the Court refused to apply strict scrutiny to strike down state laws simply because those laws made it more difficult to enact legislation that would benefit a certain group of people. See *James*, 402 U.S. at 140-42 (upholding a state constitutional amendment requiring voter approval of low-rent public housing projects because the amendment did not make race-based distinctions); *Gordon*, 403 U. S. at 4-7 (upholding state constitutional provisions requiring three-fifths voter approval for all bond issues because that provision "singles out no 'discrete and insular' minority for special treatment"). As this Court explained in *Hunter*, "[b]ecause the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race, racial classifications are constitutionally suspect and subject to the most rigid scrutiny. They bear a far heavier burden of justification than other classifications." 393 U. S. at 391-92 (internal quotations and citations omitted).

The Colorado Supreme Court justified applying strict scrutiny to Amendment 2 by distinguishing between state laws that

single out "independently identifiable groups" and those that do not. Thus, state laws placing special burdens on the enactment of certain legislation violate the fundamental right to participate in the political process only if those laws seek to make it more difficult to enact laws benefitting groups identified "apart from the groups created by the [challenged] statute itself." *Evans I*, 854 P. 2d at 1282. Thus, this reasoning goes, because the provisions in *Hunter* and *Washington* targeted laws benefiting racial minorities, groups identifiable by something other than their members' desire to have certain legislation enacted in their behalf, those laws violated the fundamental right to participate and required strict scrutiny analysis. On the other hand, since people favoring bonded indebtedness are defined as a group only by their favoring bonded indebtedness, the constitutional provision in *Gordon* that made it more difficult to incur such debt did not violate the right to political participation. It follows, at least in the view of the Colorado Supreme Court and the respondents, that Amendment 2 violates the right to equal participation because it targets laws benefitting homosexuals, a group defined by something other than the group's members' preferences for laws banning discrimination against homosexuals.

There are at least two problems with this distinction. The first is that the distinction makes no sense if the right at issue is the "right to participate in the political process." *Evans I*, 854 P. 2d at 1279. It is true that homosexuals would benefit from anti-discrimination laws making homosexuality a forbidden ground for decision. Yet, it would be presumptuous to assume that all homosexuals support such anti-discrimination laws (just as it would be presumptuous to assume that all blacks or women favor anti-discrimination laws). It also would be presumptuous to assume that *only* homosexuals support anti-discrimination laws protecting homosexuals. Indeed, the fact that more than 46 % of Colorado citizens who voted opposed Amendment 2 raises (at least) a strong inference that anti-discrimination laws protecting homosexuals enjoy support among many who are not homosexual.

If what is at issue in this case really is the right to participate in the political process, it is logical to conclude that only those who actually *favor* homosexual rights laws are being denied that right because it is only people who seek to enact homosexual rights laws who face the higher burden that Amendment 2 establishes. This class is not defined by homosexuality, since it includes both homosexuals and heterosexuals and also excludes some homosexuals.[2] Rather, the class is defined by support for the type of laws Amendment 2 makes more difficult to enact. That is, the group denied the right to participate is not "independently identifiable apart from the group created by [Amendment 2] itself." This, however, is the very type of group to which the Colorado Supreme Court stated the fundamental right to participate does not extend. *Evans I*, 854 P. 2d at 1282.

Besides being illogical, the Colorado Supreme Court's purported distinction also fails to explain this Court's decision in *James v. Valtierra*. In *James*, this Court refused to apply *Hunter* to strike down a California constitutional provision requiring voter approval of any low-income public housing project. 402 U. S. at 140-42. As Justice Marshall recognized in his dissent, the provision "explicitly" singled out poor people; no other publicly-assisted housing project designed to benefit any other group had to be approved by voters. See *id.* at 144 (Marshall, J. dissenting). It is specious to suggest that poor people are not an "independently identifiable" group; poor people would be poor even if citizens could more easily have public housing laws enacted. But in *James* this Court treated *Hunter* as a case involving distinctions based on race, a suspect classification, and refused to extend *Hunter* to strike down a state law making distinctions based on income, a non-suspect

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[2] In fact, rather than burdening the right of homosexuals who oppose anti-discrimination laws to participate in the political process, Amendment 2 advances their position by making such laws more difficult to enact.

classification. See 402 U. S. at 140-42.

The Colorado Supreme Court dismissed *James* as "best understood as a case declining to apply suspect class status to the poor, not as a limitation on *Hunter*." *Evans I*, 854 P. 2d at 1282 n. 21. But this attempted distinction just underscores that *Hunter's* result depended not on any fundamental right but rather on the fact that racial classifications are, as the *Hunter* Court noted, "constitutionally suspect." *Hunter*, 393 U. S. at 391. By refusing to extend *Hunter* to a provision discriminating against a non-suspect class, the Court in *James* recognized that the constitutional infirmity in the provision involved in *Hunter* was that the provision discriminated against a suspect class, not that the provision violated any fundamental right.

Likewise, Amendment 2 violates no fundamental right, so the question in this case involves calssification. While homosexuals constitute an identifiable group, that begs the question of what level of scrutiny to apply to laws such as Amendment 2 that make distinctions based on homosexuality. The level of scrutiny depends on whether or not homosexuals constitute a suspect class; as we shall see in the next section, they do not.

II. UNDER TRADITIONAL EQUAL PROTECTION ANALYSIS, COLORADO CONSTITUTIONAL AMENDMENT 2 DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

A. Homosexuals, Bisexuals, and Lesbians Do Not Constitute a Suspect Class.

Federal courts of appeals that have considered the question consistently have found that homosexuality is not a suspect classification. See, e.g., *Steffan v. Perry*, 41 F. 3d 677, 684 n. 3 (D.C. Cir. 1994); *High Tech Gays v. Defense Industry Clearance Office*, 895 F.

2d 563, 573-74 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Woodward v. United States*, 871 F. 2d 1068, 1076 (Fed. Cir. 1989); *Padula v. Webster*, 822 F. 2d 97, 103 (D. C. Cir. 1987); *National Gay Task Force v. Board of Education*, 729 F. 2d 1270, 1273 (10th Cir. 1984). The reasons for this are not difficult to see. Suspect classes[3] generally are accorded special protection because they have been "'relegated to such a position of powerlessness as to command protection from the majoritarian political process.'" *Massachusetts Board of Retirement v. Murgia*, 427 U. S. 307, 313 (1976) (per curiam) (quoting *San Antonio School District v. Rodriquez*, 411 U. S. 1, 28 1973)). For instance, racial minorities, and blacks in particular, have suffered from "severe economic deprivation caused by pervasive discrimination. . . ." Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 Notre Dame L. Rev. 393, 406 (1994). Blacks were brought to this country as slaves, and even after emancipation had to suffer through the indignity of pervasive and economically and politically stultifying discrimination well into the present century. See generally *id.* at 406-07 and sources cited therein.

Homosexuals, on the other hand, are economically advantaged compared to similarly situated people, which indicates they have not been the victims of the kind of devestating discrimination

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[3] This Court has recognized three classifications as suspect: race, *Hunter*, 393 U. S. at 392; alienage, *Graham v. Richardson*, 403 U. S. 365, 372 (1971); and national origin, *Korematsu v. United States*, 323 U. S. 214, 216 (1944). In *New Orleans v. Dukes*, 427 U. S. 297, 303 (1976), the Court also included religion among suspect classifications. Besides recognizing several suspect classifications, this Court also has recognized two "quasi-suspect" classifications: sex, *Mississippi University for Women v. Hogan*, 458 U. S. 718, 723-24 (1982) and illegitimacy, *Lalli v. Lalli*, 439 U.S. 259, 265 (1978). Classifications that touch on these categories are subject to a somewhat more stringent review than the normal national basis test. See *Hogan*, 458 U. S. at 724. For the same reasons they do not constitute a suspect class, homosexuals also do not constitute a quasi-suspect class.

as that faced by racial minorities. Average household income for homosexual men and lesbians is generally higher than the national average, and homosexuals are more likely to have college degrees and hold professional or managerial positions than heterosexuals. See *id.* at 408-09. Homosexuals also have political power disproportionate to their numbers. In fact, "'it is clear that homosexuals have crossed a threshold [and have become] an integral part of American political life.'" *Id.* at 410 (quoting Jeffrey Schmalz, *Gay Politics Goes Mainstream*, N. Y. Times, Oct. 11, 1992, §6 (Magazine), at 20); see also *High Tech Gays*, 895 F. 2d at 574 (noting that "homosexuals are not without political power").

More importantly, unlike race, national origin, or sex, homosexuality is not an immutable characteristic. A person cannot choose to be born African-American, Chinese-American, or female. Homosexuality, however, is "fundamentally different," *High Tech Gays*, 985 F. 2d at 563, because what defines the class of homosexuals is conduct. See *id.* at 563-64 ("Homosexuality is not an immutable characteristic; it is behavioral"); *Ben-Shalom*, 881 F. 2d at 464 (an admission of homosexuality "is compelling evidence that plaintiff has in the past and is likely to again engage in [homosexual] conduct"); *Woodward*, 871 U. S. at 1076 ("homosexuality is primarily behavioral in nature").

One might argue that homosexuality is not necessarily defined by behavior because a person can be homosexual in orientation without actually engaging in homosexual behavior. But the courts of appeals have routinely rejected this assertion, recognizing that for practical purposes a person's identification of himself as homosexual is strong–indeed compelling–evidence that the person is engaging in or desires to engage in homosexual conduct. See *Steffan*, 41 F. 3d at 690; *Ben-Shalom*, 881 F. 2d at 464. "To pretend that homosexuality or heterosexuality is unrelated to conduct borders on the absurd. What distinguishes the class of homosexuals from the class of heterosexuals is . . . the nature of the member's sexual

proclivities or interests. . . ." *Watkins v. United States*, 847 F. 2d 1329, 1361 n.19 (9th Cir. 1988) (Reinhardt, J., dissenting.), *vacated*, 875 F. 2d 699 (9th Cir. 1989).[4] Thus, "[e]ven if we define the class as those who have a 'homosexual orientation,' its members will consist principally of active practicing homosexuals. . . ." *Id.* at 1360-61. Even a leading homosexual rights organization has stated that "homosexuality is inexorably intertwined with 'homosexual conduct.'" *Steffan*, 41 F. 3d at 640 n. 11 (quoting Amicus Curiae Brief on Behalf of Respondents of Lambda Legal Defense Fund, Inc. at 23 n. 28, *Bowers v. Hardwick*, 478 U. S. 186 (1986) (No. 85-149)).

That the class of homosexuals is defined by conduct is important. "Discrimination" against people because of the way they act (or desire or intend to act) is not invidious. This is especially so when the conduct at issue generally is regarded not as morally neutral but as morally controversial. Discriminating against a black person is irrational and therefore most likely based on animus for the person, because the fact that a person is black tells us nothing about his character. But given the moral controversy surrounding homosexuality, when a person "makes a distinction based upon a person's sexuality, he is making a judgment about the content of the individual's character." Duncan, *Homosexual Rights Legislation*, 69 Notre Dame L. Rev. at 405. Cf. *Bray v. Alexandria Women's Health Clinic*, 113 S.Ct. 753, 760 (1993) (because there are "common and respectable reasons for opposing [abortion] other than hatred of or

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[4] Significantly, in *Watkins*, Judge Reinhardt, while demonstrating why homosexuals are not a suspect class, expressed his personal agreement with the view that homosexuals are a suspect class, and sharply criticized this Court's opinion in *Bowers v. Hardwick*, 478 U. S. 186 (1986), which held the Constitution does not protect homosexual sodomy. See *Watkins*, 847 F. 2d at 1356, 1358 (Reinhardt, J. dissenting). Despite his personal view, Judge Reinhardt's dissent implicitly recognized that to hold that homosexuals are a suspect class would require this Court to overrule *Bowers*. See *infra*.

condecension toward. . . women as a class," opposition to abortion is not an "irrational surrogate" for opposition to women). As Dr. Martin Luther King insightfully recognized, racial discrimination is wrong because it involves a judgment based on something other than "the content of [a person's] character." *Id.* at 402 n. 37 (quoting *I Have a Dream*, reprinted in *A Testament of Hope: The Essential Writings of Martin Luther King, Jr.* 219 (James Melvin Washington ed. 1991)). That being so, there is a significant difference between classifications based on race and classifications based on sexual orientation, a difference that should be reflected in the level of constitutional scrutiny given to laws making those classifications.

Moreover, to recognize homosexuals as a suspect class would conflict with this Court's decision in *Bowers v. Hardwick*, 478 U. S. 186 (1986). In *Bowers*, this Court upheld a Georgia law making sodomy a crime, as applied to a homosexual defendant, because the Constitution contains no fundamental right to commit homosexual sodomy and because a rational basis supported the law. *Id.* at 192, 195-96. As several courts of appeals have recognized, it would make no sense to declare homosexuals a suspect class when states may criminalize the conduct that defines the class. See *Ben-Shalom*, 881 F. 2d at 464; *Woodward*, 871 F. 2d at 1076; *Padula*, 822 F. 2d at 103. As the D. C. Circuit noted in *Padula*, "there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal." 822 F. 2d at 103.

For all these reasons, homosexuals do not constitute a suspect class. Therefore, laws making distinctions based on sexual orientation, such as Amendment 2, need only be rationally related to a legitimate government interest to pass constitutional muster. *Heller v. Doe*, 113 S. Ct. at 2642. Amendment 2 easily passes that test.

B. Amendment 2 Is Rationally Related to Several Legitimate State Interests.

In analyzing whether Amendment 2 rationally relates to any legitimate state interest, it is important to keep in mind that anti-discrimination laws do not come without costs. Generally, in a free society a person may associate with whomever he pleases and may dispose of and control access to his property as he pleases. Employers generally are free to hire and fire whomever they please for any reason. Anti-discrimination laws constitute an exception to this general rule. When a state enacts a law prohibiting discrimination against a certain group, it is in effect telling citizens they must associate with members of that group, or that they must make their property available for members of that group. In other words, anti-discrimination laws constitute governmental regulation of personal relationships and property that limit the liberty of people to act as they see best.

In imposing anti-discrimination laws, states must decide whether the benefits derived from protecting a certain group against discrimination outweigh the costs imposed on the associational and property rights of other citizens. Part of that calculus is the need to protect group members. As noted above, homosexuals as a class generally are economically advantaged, well educated, and politically powerful. A state could rationally conclude that the need to protect homosexuals is not great and therefore does not outweigh the burden placed on other citizens' general right to associate and use their property as they see fit.

Likewise, as Justice Erickson recognized in his dissent, a state's resources are not limited, and states have a legitimate interest in spending those resources as effectively as possible. That means a state must necessarily make choices, choices which may not treat all groups equally. In the area of civil rights protection, it is rational for a state to focus its resources on protecting traditional suspect classes that are in greater need of protection than relatively affluent and well-educated classes, such as homosexuals, who have less need of protection. By making it more difficult to enact anti-discrimination laws protecting homosexuals, Amendment 2 serves the goal of preserving civil rights enforcement resources for use for traditionally suspect groups. See *Evans II*, 882 P.2d at 1365-66 (Erickson, J., dissenting).

One might argue that the state could serve these legitimate purposes simply by not passing anti-discrimination laws protecting homosexuals, and that removing the issue from the normal political process is not necessary. But rational basis analysis does not require a state to use the most narrowly tailored means possible to address a legitimate interest. "A classification does not fail rational-basis review because it is not made with mathematical nicety," so long as there is some rational connection between the end and the means. *Heller*, 113 S.Ct. at 2643. Certainly, a state rationally may conclude that making it more difficult to enact anti-discrimination laws protecting homosexuals will protect property and association rights from the intrusive regulation associated with those laws and conserve enforcement resources for use in other areas.

Associational and property rights are not the only liberties that can come in conflict with anti-discrimination laws. Many people have sincere religious or moral beliefs that would prevent them from hiring or doing certain types of business with homosexuals. For example, persons running a religious school may sincerely believe that hiring homosexuals would be wrong because hiring homosexuals would create a harmful influence on students. Or, a landlord might not want to rent to two homosexuals out of a sincere belief that it would be wrong to facilitate homosexual activity. Compare *Attorney General v. Desilets*, 636 N.E. 2d 233 (Mass. 1994) and *Smith v. Fair Employment and Housing Commission*, 30 Cal.Rptr. 2d 395 (Cal. App. 1994),*review granted*, 880 P.2d 111 (Cal. 1994), both of which involved state attempts to force landlords to rent to cohabitating unmarried couples despite the landlords 'sincere belief that renting to those couples would violate the landlords' religious convictions.

Protecting citizens' religious liberty is certainly a legitimate state interest. The United States Constitution itself grants special protection to the free exercise of religion. U.S. Const. Amend. 1, cl. 2. By precluding legislation that would increase the opportunities for conflict between religious belief and legal duty and would "use governmental power to punish and discourage employers and landlords for making decisions based upon sincerely held religious or moral beliefs," Duncan, *Homosexual Rights Legislation*, 69 Notre Dame L. Rev. at 405, Amendment 2 serves to protect Colorado citizens' religious liberty.

CONCLUSION

Amendment 2 does not violate any fundamental right. Homosexuals, the class Amendment 2 singles out, are not a suspect class. Amendment 2 is rationally related to several legitimate state interests. Therefore, this Court should reverse the Colorado Supreme Court's decision in this case and hold that Amendment 2 does not violate the Equal Protection Clause.

Respectfully submitted,

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